

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL ETCHEGOINBERRY, *et al.*,
Plaintiffs,
v.
THE UNITED STATES OF AMERICA,
Defendant.

JOINT STATUS REPORT AND MOTION FOR FURTHER STAY OF PROCEEDINGS

Plaintiffs and Defendant United States of America (the “Parties”) respectfully submit this Twenty-seventh Joint Status Report regarding the progress of their settlement discussions. For the reasons stated in this Joint Status Report, the Parties move that the stay of this matter be continued to and including September 27, 2019, and that the Parties file a further Joint Status Report on that date.

1. On April 4, 2019, this Court issued a further stay of this case until June 26, 2019, a stay coordinated with the stay granted in *Westlands Water Dist. v. United States*, Case No. 2013-5069 (Fed. Cir.) (“*Westlands*”). See ECF No. 126; Apr. 16, 2019, Order, *Westlands* (ECF No. 69).

2. As previously reported, the United States and Westlands Water District (“Westlands”) reached a settlement regarding the management of drainage within Westlands’ service area (“Settlement Agreement”). This Settlement Agreement would provide the means for resolving all pending claims in this case and in *Westlands*, and may affect the provision of drainage service under orders issued by the district court in *Firebaugh Canal Water Dist., et al. v. United States, et al.*, Case No. 88-cv-634-LJO (E.D. Cal.) (“*Firebaugh*”).

3. On September 16, 2015, the Federal Defendants in *Firebaugh* reported to the United States District Court for the Eastern District of California that the United States and Westlands executed the Settlement Agreement. *See* Federal Defendants' Notice of Filing Settlement Agreement, Sept. 16, 2015, *Firebaugh* (ECF No. 1001). The Settlement Agreement is attached to the Notice of Filing Settlement Agreement and identifies certain provisions of a proposed settlement of the *Etchegoinberry* case. *See id.* Implementation of the Settlement Agreement depended on the enactment of authorizing federal legislation. Legislation authorizing the implementation of the Settlement Agreement was not enacted by January 15, 2017, which had been the deadline for legislative action under the Settlement Agreement.

The United States and Westlands executed an addendum to the Settlement Agreement, extending by one year, to January 15, 2018, the date by which the Settlement Agreement would become voidable by either party if authorizing legislation were not enacted into law. Legislation authorizing the implementation of the Settlement Agreement was not enacted by January 15, 2018. Nevertheless, neither the United States nor Westlands has voided the Settlement Agreement.

4. Because Congress did not pass enabling legislation by the January 15, 2018, expiration of the *Firebaugh* stay, the United States filed a status report indicating that the Bureau of Reclamation ("Reclamation") is returning to implementation of the control schedule. A copy of the declaration the United States filed in *Firebaugh* in support of that status report was attached to the Parties' Twenty-first Joint Status Report (ECF No. 115). A further status report and accompanying declaration were filed in *Firebaugh* on March 29, 2019, and are attached as Exhibit 1 to this Joint Status Report. That report states that Reclamation is continuing the development of a comprehensive control schedule that will address in detail the expected project

activities associated with the implementation of drainage service for both Westlands and for districts situated in the San Luis Unit north of Westlands. Ex. 1 at 5.

5. Because of the developments stated above, the United States and Westlands moved to extend the stay of the *Westlands* action currently pending before the Federal Circuit. On April 16, 2019, the Federal Circuit continued the stay in *Westlands* until June 24, 2019. Apr. 16, 2019, Order, *Westlands* (ECF No. 69). On June 24, the *Westlands* parties filed a status report and unopposed motion to continue the stay in that case until September 23, 2019. June 24, 2019, Status Report, *Westlands* (ECF No. 70). The Federal Circuit has not yet acted on that motion.

6. In sum, because Congress has not passed the enabling legislation called for in the Settlement Agreement, Reclamation has returned to implementing the control schedule. Consequently, the Parties and Westlands have been exploring and continue to actively explore ways by which they can attain the benefits of the Settlement Agreement, including the settlement of *Etchegoinberry*.

7. For the foregoing reasons, the Parties respectfully request that this Court continue the stay of this case for 93 days (i.e., to and including September 27, 2019) so as to allow the Parties to continue to explore ways by which they can attain the benefits of the Settlement Agreement, including the settlement of *Etchegoinberry*. The Parties propose that they file a Joint Status Report on those efforts and discussions on September 27, 2019.

Dated: June 26, 2019

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FIREBAUGH CANAL WATER DISTRICT and	) 1:88-cv-634-LJO/SKO
CENTRAL CALIFORNIA IRRIGATION DISTRICT,	) 1:91-cv-048-LJO/SKO
	) (Partially Consolidated)
Plaintiffs,)
	) FEDERAL DEFENDANTS'
v.	) STATUS REPORT
	) OF APRIL 1, 2019
UNITED STATES OF AMERICA, <i>et al.</i> ,)
)
Defendants, and)
)
WESTLANDS WATER DISTRICT, <i>et al.</i> ,)
)
Defendants-in-Intervention.)

Federal Defendants in the above-captioned case, through their undersigned attorneys, respectfully submit this Status Report of April 1, 2019, to provide the Court with a further report on the present status of actions by the Federal Defendants with regard to the provision of drainage service to the San Luis Unit ("SLU") of the Central Valley Project ("CVP"). On December 7, 2009, the Court (per Judge Wanger) signed a Scheduling Order that, among other things, directed the Federal Defendants to perform the actions "as the Bureau of Reclamation has proposed to perform them" summarized in Part I of the Parties' Supplemental Status Report of

1 November 18, 2009 (ECF 752). ECF 758.¹ The instant Status Report focuses on Federal
2 Defendants' activities since October 1, 2018, with respect to those actions. In support of this
3 Status Report, Federal Defendants submit the Declaration of Alicia Forsythe in Support of
4 Federal Defendants' Status Report of April 1, 2019 ("Forsythe Declaration").

5 **I. IMPLEMENTATION OF THE RECORD OF DECISION**

6 As the record in this case reflects, Reclamation in 2009 commenced implementation of its
7 Record of Decision, San Luis Drainage Feature Re-Evaluation (March 2007) ("2007 SLDFR
8 ROD"), and has been implementing the 2007 SLDFR ROD in accordance with schedules and
9 cost estimates contained in control schedules provided to the Court and the Parties.
10 Implementation of the 2007 SLDFR ROD is subject to existing authorities and the existing
11 appropriations ceilings under the San Luis Act, Pub. L. 86-488, 74 Stat. 156, and further subject
12 to applicable law and the availability of funds appropriated by the Congress for this purpose and
13 apportioned by the Office of Management and Budget. ECF 752 at 2-3. We have further
14 explained that construction of any drainage service facilities within Westlands Water District
15 ("Westlands"), including but not limited to the actions set forth in the control schedules, requires
16 Westlands to repay construction costs and to pay operation and maintenance costs of such
17 facilities. *Id.* at 3.

18 Federal Defendants provided a revised control schedule to the Court on November 4,
19 2011 (*see* ECF 946 at 2-3; ECF 921, 921-1 & Attach.) ("Revised Control Schedule").² This
20 Revised Control Schedule provided a schedule for data-gathering, design, and construction, with
21 associated cost estimates, for drainage facilities in a portion of the central sub-unit of Westlands
22

23 ¹ Federal Defendants previously provided the Court with Status Reports dated April 1, 2010 (ECF 761), October 1,
24 2010 (ECF 812), April 1, 2011 (ECF 864), October 1, 2011 (ECF 912), April 1, 2012 (ECF 946), October 1, 2012
25 (ECF 962), April 1, 2013 (ECF 963), October 1, 2013 (ECF 967), April 1, 2014 (ECF 974), October 1, 2014 (ECF
26 980), April 1, 2015 (ECF 1000), October 1, 2015 (ECF 1005), April 1, 2016 (ECF 1011), October 1, 2016 (ECF
27 1012), April 1, 2017 (ECF 1025), October 1, 2017 (ECF 1026), April 1, 2018 (ECF 1033), and October 1, 2018
28 (ECF 1034) on their progress in performing those actions. In addition, Federal Defendants filed a Supplemental
Status Report on January 19, 2018, following the expiration of the partial stay previously granted by this Court with
regard to drainage activities in Westlands Water District (ECF 1027).

² The Federal Defendants' Status Report of April 1, 2012 summarizes the development of the Revised Control
Schedule. *See* ECF 946 at 2-3.

1 and for a Demonstration Treatment Plant (“Demo-Plant”) located in the northerly area of the
2 SLU and within the San Joaquin River Improvement Project (“SJRIIP”) situated in the Panoche
3 Drainage District (“Panoche DD”), in Firebaugh, California. Following the expiration of the
4 partial stay on January 15, 2018, Federal Defendants submitted an updated Revised Control
5 Schedule (“2018 Revised Control Schedule”) to the Court and the parties, as an attachment to the
6 Supplemental Declaration of Federico Barajas Re: Revised Control Schedule (ECF 1027-1)
7 (“Supplemental Barajas Declaration”), which accompanied Federal Defendants’ Supplemental
8 Status Report (ECF 1027). As Ms. Forsythe explains, the 2018 Revised Control Schedule
9 contains a description of major activities, together with revisions to schedule and estimated
10 annual funding requirements, for the implementation of Phase 1 of drainage service for
11 Westlands’ central sub-unit. Forsythe Decl. ¶ 7. Implementation of activities under the 2018
12 Revised Control Schedule since October 1, 2018, are discussed below.

13 **A. Westlands Settlement and the Drainage Agreement with**
14 **San Luis Water District.**

15 On September 16, 2015, Federal Defendants notified the Court that the United States and
16 Westlands had executed a Settlement Agreement (“Westlands Settlement”) over drainage within
17 Westlands’ boundaries. ECF 1001. The Westlands Settlement requires the enactment of federal
18 authorizing legislation before it can be implemented. Federal Defendants have summarized, in
19 prior status reports, the steps they and Westlands have taken to attempt to secure the enactment
20 of legislation authorizing implementation of this Settlement. *See, e.g.*, ECF 1026 at 3 (Status
21 Report of Oct. 1, 2017); ECF 1033 at 3-4 (Status Report of Apr. 1, 2018); ECF 1034 at 3-4
22 (Status Report of Oct. 1, 2018). A bill introduced in the House during the 115th Congress failed
23 to secure a floor vote, and no action was taken in the Senate regarding the Westlands Settlement.
24 ECF 1034 at 3. No bill has been introduced in the 116th Congress to authorize the Westlands
25 Settlement. Nevertheless, although the Westlands Settlement has by its own terms become
26 voidable, neither Westlands nor the United States have exercised their rights to void it. In the
27 meantime, following the expiration of the partial stay on January 15, 2018, Reclamation has
28 resumed work on the implementation of drainage service within Westlands, as described in more
detail below.

1 Federal Defendants have also previously reported on the negotiation of a separate
2 drainage agreement with the San Luis Water District (“San Luis WD”), one of the districts
3 situated in the SLU north of Westlands. See, e.g., ECF 1033 at 4-5. To summarize, on April 27,
4 2017, Reclamation signed an “Agreement between the United States and the San Luis Water
5 District” (“San Luis WD Drainage Agreement”). Forsythe Decl. ¶ 5. Under the San Luis WD
6 Drainage Agreement, San Luis WD would agree to support amendments to the San Luis Act of
7 1960 that, if enacted, would relieve the United States of its obligations under that statute to
8 provide drainage service to San Luis WD, and would further agree to assume legal responsibility
9 for the management of drainage within its boundaries, in exchange for certain consideration
10 requiring approval by Congress. *Id.* On September 5, 2017, Reclamation awarded a \$3 million
11 financial assistance agreement to San Luis WD. The agreement includes funds for the following
12 activities: (1) a Drainage Implementation Master Plan that would serve as a road map for San
13 Luis WD to achieve the overall goal of nearly eliminating drainage water discharge from San
14 Luis WD; (2) California Environmental Quality Act compliance for adoption by the district and
15 National Environmental Policy Act compliance for Reclamation’s review and finalization of the
16 proposed Drainage Implementation Master Plan; and (3) final plans and specifications for the
17 Kaljian Drainwater Reuse Project’s Charleston Drainage District Ditch Improvements, which
18 would provide the San Luis WD with the ability to capture and reuse drainwater from the
19 Charleston Drainage District area. *Id.* ¶ 6. The agreement also includes the construction of a
20 portion of the project that includes three pump stations and pipelines and re-grading
21 approximately 2 miles of the drainage ditch. San Luis WD’s implementation of actions under
22 the financial assistance agreement are ongoing and expected to be completed by September 30,
23 2021. To date, San Luis WD has completed a Feasibility Analysis and Design Criteria Report,
24 has commissioned a peer review of the 30% project design for construction activities, and has
25 released a Request for Qualification to develop a Drainage Implementation Master Plan. *Id.* ¶ 6.
26 In addition, Reclamation is working with San Luis WD on a new financial assistance agreement
27 for up to \$3.8 million to fund other drainage projects.

28 /////

B. Continued Implementation of the 2018 Revised Control Schedule.

Since the submission of the 2018 Revised Control Schedule, Ms. Forsythe reports that Reclamation is implementing the following project activities. First, Reclamation is collecting and analyzing data to verify and validate the original assumptions and conceptual plans presented in its 2008 Feasibility Study. Specifically, Reclamation is reviewing and analyzing recent depth to groundwater information, current land use and ownership information, and updated existing facility information. Forsythe Decl. ¶ 8(a). This analysis will allow Reclamation to accurately update the original designs for drainage service in Westlands and improve project planning. Reclamation anticipates completing this data review by mid-2019. Once the data review is completed, Reclamation intends to continue with design and implementation of Phase 1 in the central sub-unit of Westlands. *Id.*

Second, Reclamation is updating a previous draft of a repayment contract with Westlands to be shared with Westlands for evaluation and input. Under Reclamation law, the construction, operation, and maintenance of agreed upon drainage service features requires repayment by Westlands. *Id.* ¶ 8(b). A critical step in negotiating a contract for the repayment of these expenses is the preparation of a Basis of Negotiation consistent with Reclamation Directives and Standards PEC 06-01. *Id.* The Basis of Negotiation being prepared by Reclamation's Mid-Pacific Region would request that the Commissioner delegate the authority to negotiate, sign, and administer the repayment contract to the Regional Director in the Mid-Pacific Region. The Mid-Pacific Region anticipates sending the request for a Basis of Negotiation to the Reclamation Policy Office in April 2019. The Reclamation Policy Office would then complete its review and transmit the Basis of Negotiation to the Commissioner's Office.

Third, Reclamation is continuing the development of a comprehensive control schedule that will address in detail the expected project activities associated with the implementation of drainage service for both Westlands and for the Northerly Area Districts. Development has focused on identifying appropriate schedule activities associated with environmental compliance, land acquisition, design, procurement and construction, creating logical relationships between these activities, and identifying accurate activity durations. *Id.* ¶ 8(c). Reclamation anticipates

1 submitting this comprehensive control schedule to the Court and the Parties through a
2 Supplemental Status Report later in 2019. Reclamation anticipates that project activities will be
3 further refined as actual implementation within each sub-area proceeds. As Ms. Forsythe
4 explains, Reclamation's ability to successfully implement the control schedule will be based on
5 the availability of appropriations from Congress. *Id.*

6 **C. Implementation of the 2018 Revised Control Schedule in the**
7 **Northerly Area.**

8 With regard to implementation of the 2018 Revised Control Schedule in the Northerly
9 Area Districts, Ms. Forsythe reports that Panoche DD operated the Demo-Plant to meet salt and
10 selenium removal performance requirements (98% salt removal and selenium removal to below
11 10 parts per billion) until the expiration on December 31, 2018 of a Cooperative Agreement
12 between Panoche DD and Reclamation (described in the Eighth Supplemental Declaration of
13 David Murillo in Support of Federal Defendants' Status Report of October 1, 2016). ECF 1012-
14 2 ¶ 4(b). Forsythe Decl. ¶ 9. On January 1, 2019, Reclamation shut the Demo-Plant down to
15 make improvements to the waste handling processes as well as structural improvements at the
16 plant. *Id.* ¶ 9(g). Reclamation determined it would be more cost effective to make these
17 improvements while the plant is offline. The Demo-Plant will be offline for up to a year. *Id.*

18 With regard to recent actions at the Demo-Plant prior to its being taken offline, Ms.
19 Forsythe reports on:

20 (1) Improvements in nutrient quality control of the selenium biotreatment process
21 (used to remove selenium from drainage water) involving the use of a soy-based glycerin source,
22 instead of glycerin derived from animal and other plant-based raw materials. Reclamation began
23 bioreactor feeding with soy-based glycerin on October 7, 2018 until the plant shutdown. The
24 consistent quality of the soy-based nutrient source improved the already stable bioreactor
25 operation, with average effluent selenium concentrations below 5 parts per billion. *Id.* ¶ 9(a).

26 (2) Expansion of the ultrafiltration reverse osmosis pretreatment, which is used on
27 drainwater after selenium biotreatment, to remove particulates in the drainwater ("feed water").
28 Once selenium is reduced to concentrations below 5 parts per billion from drainwater through the

1 biotreatment process described above, the drainwater undergoes reverse osmosis pretreatment
2 filtration to remove particulates in the drainwater. *Id.* ¶ 9(c). Reclamation has determined, based
3 on test results, that membrane ultrafiltration is the appropriate technology to use at the Demo-
4 Plant for pretreatment of drainwater in the reverse osmosis filtration process (as opposed to
5 media filtration). The expansion ultrafiltration process equipment was installed at the Demo-
6 Plant and became operational on October 28, 2018. *Id.* ¶ 9(b). Substantial completion testing for
7 the Demo-Plant has been delayed, however, due to modifications to the plant's solids handling
8 process and limitations in pumping capacity. Reclamation anticipates that substantial completion
9 testing will occur after the scheduled 2019 construction retrofits are completed. *Id.* Prior to the
10 shutdown of the Demo-Plant, the ultrafiltration pretreatment increased its recovery of input water
11 from 89% to 97%. Based on additional testing, Reclamation determined that a 97% recovery is
12 the maximum for this unit. *Id.* ¶ 9(c).

13 (3) Once drainage water has gone through the ultrafiltration pretreatment, it then
14 undergoes reverse osmosis treatment. There were three reverse osmosis units at the Demo-Plant:
15 a sea water reverse osmosis unit; a brackish water reverse osmosis unit; and a pilot reverse
16 osmosis unit. *Id.* ¶ 9(d). Reclamation's recent efforts have focused on the pilot reverse unit,
17 which has now been decommissioned, but had been operated at up to 75% recovery of water that
18 is put through this treatment, with a target, based on water quality modeling, of 78% recovery,
19 meaning that 75% of the influent water is processed into clean "product water" from which 98%
20 of the salt is removed and concentrated into a remaining 25% concentrate stream that did not
21 pass through the membrane. *Id.*

22 (4) The selenium biotreatment, ultrafiltration pretreatment, and reverse osmosis
23 treatment together recover "product water" from drainage water, which can be reused for
24 beneficial purposes. These processes also produce a waste stream. Some of these waste streams
25 contain selenium and are segregated from waste streams that do not contain selenium.
26 Reclamation has identified process piping to separate these waste streams and route the streams
27 to locations best suited to receive selenium-containing or non-selenium containing waste. *Id.* ¶
28 9(e). Reclamation is considering a retrofit of the waste handling process due to the accumulation

1 of solids in several waste handling tanks; a retrofit has been designed and a solicitation for
2 proposals is expected to be posted by the summer of 2019. *Id.* ¶ 9(f).

3 **II. RECLAMATION SUPPORT FOR ADDITIONAL DRAINAGE PROJECTS**

4 In addition to the activities summarized in Section I above, Reclamation has taken a
5 series of drainage-related actions in continued support of the following projects:

6 **A. Activities Associated With the Grassland Bypass Project.**

7 Federal Defendants have summarized in previous status reports Reclamation's activities
8 in support of the Grassland Bypass Project ("GBP"), which uses a segment of the San Luis Drain
9 to remove agricultural drainage from the Grassland Drainage Area under Waste Discharge
10 Requirements ("WDR") established by the Regional Water Quality Control Board. Reclamation
11 and the San Luis & Delta-Mendota Water Authority ("Authority") continue to implement the
12 2009 Agreement for the Continued Use of the San Luis Drain ("Third Use Agreement") that
13 allows the Authority to operate the GBP through December 31, 2019. *Id.* ¶ 10(a). The primary
14 goal of the GBP is to protect the Grasslands wetlands water supply channels from contamination
15 from agricultural drain water and storm runoff originating in the Grasslands Drainage Area
16 ("GDA"). *Id.* Reclamation continues to conduct the GBP environmental monitoring program to
17 measure selenium and salts in the San Luis Drain, Mud Slough (north), Salt Slough, and the
18 lower San Joaquin River to confirm that monthly load values specified in the Third Use
19 Agreement and WDR continue to be met. The Third Use Agreement is set to expire on
20 December 31, 2019 at which time agricultural drainage and storm water will no longer be
21 permitted to be discharged into the San Luis Drain. The Grassland Area farmers are finalizing a
22 project description and study under the California Environmental Quality Act for a Fourth Use
23 Agreement, which will require Reclamation's review and approval, allowing for the continued
24 use of the San Luis Drain for storm water runoff. *Id.*

25 **B. Activities Associated With the Westside Regional Drainage Plan.**

26 Panoche DD continues to implement activities associated with the Westside Regional
27 Drainage Plan and the SJRIP. The SJRIP allows agricultural drainwater from the GDA to be re-
28 used to irrigate salt tolerant crops such as pistachios and salt tolerant forage grasses. Forsythe

1 Decl. ¶ 10(b)(i). Between October and August of Water Year 2018, Panoche DD estimates that
2 30,319 acre-feet of drainage water was used to irrigate these salt tolerant crops at the SJRIP,
3 thereby displacing 3,596 pounds of selenium and 202,427 tons of salt from Mud Slough and the
4 San Joaquin River. *Id.*

5 Ms. Forsythe reports that grant agreements with Panoche DD remain suspended as a
6 result of a report of the California State Controller into Panoche Water District's accounting and
7 administrative control systems and investigations by the Department of the Interior's Office of
8 Inspector General, and the suspension remains in effect pending conclusion of the Inspector
9 General's investigation. *Id.* ¶ 10(b)(ii). The suspension may affect further development of
10 SJRIP infrastructure but should not affect current operations of the SJRIP, because
11 Reclamation's grant agreements do not fund operations of the SJRIP. *Id.* In an effort to restore
12 funding for further development and expansion of the SJRIP infrastructure, Reclamation is
13 conferring with representatives of the Grasslands Drainage Area entities regarding options for
14 the future management of drainage service for the Northerly Area Districts. It is Reclamation's
15 understanding that these entities are working towards the formation of a Joint Powers Authority
16 under the California Government Code that would be representative of all or a substantial portion
17 of the drainage entities in the Grasslands Drainage Area. This new Joint Powers Authority
18 would oversee current and future drainage activities in the area, including at the SJRIP. Once
19 formed, the Joint Powers Authority would need to apply for a financial assistance agreement for
20 funding from Reclamation for current and future drainage construction actions. Reclamation
21 remains optimistic that such an authority will be created and the authority will apply for funding
22 such that Reclamation can restart its funding of drainage construction activities in the Grasslands
23 Drainage Area, including at the SJRIP. *Id.* ¶ 10(b)(iii).

24 In July 2018, the Office of the Inspector General completed its audit of Reclamation's
25 Cooperative Agreement with Panoche DD for the operations of the Demo-Plant. The audit
26 report identified \$20,777 in unsupported costs and \$193,814 in unallowable costs, for a total of
27 \$213,891 in questioned costs. Reclamation has been working with the Office of the Inspector
28

1 General and Panoche DD to resolve the audit findings and expects to resolve these audit findings
2 no later than September 2019. *Id.* ¶ 10(b)(iv).

3 Respectfully submitted this 29th day of March 2019, by:

4
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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2019, I electronically filed the “Federal Defendants’ Status Report of April 1, 2019,” and the “Declaration of Alicia Forsythe in Support of Federal Defendants’ Status Report of April 1, 2019” with the Clerk of Court using the ECF system, which automatically will send email notification to the attorneys of record.

/s/ Stephen M. Macfarlane

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FIREBAUGH CANAL WATER DISTRICT and	) 1:88-cv-00634-LJO/SKO
CENTRAL CALIFORNIA IRRIGATION DISTRICT,	) 1:91-cv-00048-LJO/SKO
	) (Partially Consolidated)
Plaintiffs,)
v.)
	) DECLARATION OF
UNITED STATES OF AMERICA, <i>et al.</i>,	) ALICIA FORSYTHE IN
	) SUPPORT OF
Defendants, and	) FEDERAL DEFENDANTS'
	) STATUS REPORT OF
WESTLANDS WATER DISTRICT, <i>et al.</i>,	) APRIL 1, 2019
)
Defendants-in-Intervention.)

I, Alicia Forsythe, declare as follows:

1. I am the Deputy Regional Director of the Bureau of Reclamation's ("Reclamation") Mid-Pacific Region, based in Sacramento, California. In my official capacity as Deputy Regional Director, I am charged with assisting the Regional Director in overseeing the management of Reclamation's water projects in an area that encompasses the northern two-thirds

Declaration of Alicia Forsythe
in Support of Federal Defendants'
Status Report of April 1, 2019
1:88-cv-00634-LJO-SKO

1 of California, most of western Nevada, and part of southern Oregon. I was appointed Deputy
2 Regional Director in February 2018 and provide direct oversight of the Klamath and Lahontan
3 Basin Area Offices, as well as supervising technical offices and programs within the region,
4 including the Construction Office and the Divisions of Environmental Affairs; Safety and
5 Emergency Management; Security; Design and Construction; Resources Management; and
6 Planning. Prior to becoming Deputy Regional Director, I served as the Program Manager for the
7 San Joaquin River Restoration Program. I began my Reclamation career in the Mid-Pacific
8 Region in 2009. I have been the Mid-Pacific Region's lead negotiator and project manager for
9 San Luis drainage discussions since January 2016. I am familiar with the actions undertaken by
10 Reclamation to provide drainage service to the San Luis Unit of the Central Valley Project. I
11 make this declaration based upon my personal knowledge, and could and would so testify
12 competently if called to do so.

13 2. In my prior declaration accompanying the United States' Status Report of
14 October 1, 2018 (ECF 1034-1), I advised the Court of Reclamation's actions associated with
15 implementation of drainage service in the San Luis Unit, including the implementation of the
16 2011 Revised Control Schedule and the 2018 Revised Control Schedule submitted on
17 January 19, 2018 (ECF 1027-1). I now provide this further declaration to update the Court on
18 Reclamation's activities in the San Luis Unit since October 1, 2018.

19 **I. IMPLEMENTATION OF THE CONTROL SCHEDULE AND THE**
20 **WESTLANDS SETTLEMENT**

21 A. The Westlands Settlement

22 3. On January 10, 2017, the United States and the Westlands Water District
23 ("Westlands") executed an Addendum to the 2015 Westlands Settlement to extend by one year,
24 from January 15, 2017 to January 15, 2018, the date by which the Westlands Settlement would
25 become voidable if authorizing legislation were not enacted into law. ECF 1013-2. The United
26 States and Westlands have not sought another extension to the Westlands Settlement to extend
27

1 the date by which the Settlement becomes voidable past January 15, 2018. However, neither the
2 United States nor Westlands has taken action to void the Settlement.

3 4. No bill has been introduced in the 116th Congress to authorize the 2015 Westlands
4 Settlement.

5 B. Agreement with San Luis Unit Water District

6 5. On April 25, 2017, Reclamation signed the “Agreement between the United
7 States and the San Luis Water District” (“San Luis WD Drainage Agreement”). Under the terms
8 of the San Luis WD Drainage Agreement, San Luis Water District (“San Luis WD”) would agree
9 to support amendments to the San Luis Act of 1960, set forth in the San Luis WD Drainage
10 Agreement, that if enacted would relieve the United States of its obligations under the statute to
11 provide drainage service to San Luis WD, and would further agree to assume legal responsibility
12 for the management of drainage within its boundaries, in exchange for certain consideration
13 requiring approval by Congress.

14 6. As previously reported to the Court (*see* ECF 1034-1 ¶¶ 6), Reclamation awarded
15 a \$3 million dollar financial assistance agreement to San Luis WD on September 5, 2017 in
16 furtherance of implementation of the San Luis WD Drainage Agreement. The agreement
17 includes funds for the following activities: (1) a Drainage Implementation Master Plan that
18 would serve as a road map for San Luis WD to achieve the overall goal of nearly eliminating
19 drainage water discharge from San Luis WD; (2) California Environmental Quality Act (CEQA)
20 compliance for adoption by the district and National Environmental Policy Act compliance for
21 Reclamation’s review and finalization for proposed activities associated with the Drainage
22 Implementation Master Plan; and (3) final plans and specifications for the Kaljian Drainwater
23 Reuse Project’s Charleston Drainage District Ditch Improvements, which would provide the San
24 Luis WD with the ability to capture and reuse drainwater from the Charleston Drainage District
25 area. The agreement includes the construction of a portion of the project that includes three
26 pump stations and pipelines and re-grading approximately 2 miles of the drainage ditch. The
27 efforts under the financial assistance agreement with San Luis WD are ongoing and expected to

1 be completed by September 30, 2021. To date, San Luis WD has completed a Feasibility
2 Analysis and Design Criteria Report, commissioned a peer review of the 30% design for
3 construction activities, and released a Request for Qualification to develop a Drainage
4 Implementation Master Plan. In addition, Reclamation is currently working with San Luis WD
5 on a new financial assistance agreement for up to \$3.8 million dollars to fund other drainage
6 projects.

7 C. Continued Implementation of the 2018 Revised Control Schedule

8 7. On January 15, 2018, the one-year extension of the partial stay of the partial
9 judgment and injunctive orders requiring Reclamation to implement drainage service within
10 Westlands expired. In preparation for the expiration of the partial stay, Reclamation reviewed
11 and revised previous control schedules to update and plan for reinitiating drainage activities
12 within Westlands. On January 19, 2018, Reclamation submitted to the Court the 2018 Revised
13 Control Schedule describing major activities, schedule, and estimated annual funding
14 requirements for the implementation of Phase 1 of drainage service for the Westlands central
15 sub-unit. (ECF 1027-1).

16 8. Since submission of the 2018 Revised Control Schedule, Reclamation has
17 continued with the following project activities:

18 a. Re-scope Project Needs: Reclamation, in collaboration with Westlands
19 and the districts situated in the San Luis Unit north of Westlands, San Luis Water District,
20 Panoche Water District, and Pacheco Water District (collectively the “Northerly Area Districts”),
21 is collecting and analyzing data to verify and validate the original assumptions and conceptual
22 plans presented in the 2008 Feasibility Study. Additionally, significant actions have been funded
23 by Reclamation and implemented as part of the Westside Regional Drainage Plan during the past
24 10 years to reuse and reduce drainage discharges. These funding and implementation activities
25 have been detailed in previous Status Reports. Specific data that Reclamation continues to
26 analyze includes recent depth to groundwater information, current land use and ownership
27 information, and updated existing facility information. This analysis will allow Reclamation to

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1 accurately update original designs to improve project planning. At the conclusion of this
2 analysis, anticipated in mid-2019, Reclamation intends to continue with the design and
3 implementation of Phase 1 for Westlands Central.

4 b. Westlands Water District Repayment Contract: Under Reclamation law,
5 construction, operation, and maintenance of agreed upon drainage service features require
6 repayment by Westlands. Reclamation is currently updating a previous draft of the repayment
7 contract to be shared with Westlands for evaluation and input. The Mid-Pacific Region of
8 Reclamation is also preparing a request for a Basis of Negotiation consistent with Reclamation
9 Directives and Standards PEC 06-01, requesting that the Commissioner delegate the authority to
10 negotiate, sign and administer the repayment contract to the Regional Director in the Mid-Pacific
11 Region. The Mid-Pacific Region anticipates sending the request for a Basis of Negotiation to the
12 Reclamation Policy Office in April 2019. The Reclamation Policy Office completes its review
13 and then transmits the Basis of Negotiation to the Commissioner's Office.

14 c. Comprehensive Control Schedule: Reclamation continues development of
15 a comprehensive control schedule to address in detail the expected project activities associated
16 with the implementation of drainage obligations for both Westlands and the Northerly Area
17 Districts and anticipates providing the schedule to the Court and the parties in a supplemental
18 status report in 2019. Development has focused on identifying appropriate schedule activities
19 associated with environmental compliance, land acquisition, design, procurement and
20 construction, creating logical relationships between these activities, and identifying accurate
21 activity durations. Reclamation's ability to successfully implement the control schedule will be
22 based on the availability of appropriations from Congress.

23 9. Panoche Drainage District ("Panoche DD") operated the Demonstration
24 Treatment Plant ("Demo-Plant") until the expiration of a cooperative agreement (December 31,
25 2018) with Reclamation, to meet salt and selenium removal performance requirements (98% salt
26 removal and selenium removal to below 10 parts per billion) using funding provided under the
27 Cooperative Agreement described in the supplemental Declaration from David Murillo in the

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1 Status Report of October 1, 2016. ECF 1012-2. The plant started a shutdown and process
2 preservation procedures in early December 2018, which were finalized by December 31, 2018
3 corresponding to the expiration of the cooperative agreement. Reclamation closed the Demo-
4 Plant to complete construction of waste handling process improvements along with other process
5 and structural improvements at the plant. Recent and on-going actions at the Demo-Plant
6 include:

7 a. Nutrient quality control improvements to optimize performance and
8 stability of the selenium biotreatment process: Glycerin nutrient is used for the selenium
9 bioreactor. This nutrient material is a byproduct of biofuel production and can include animal-
10 and/or plant-based raw materials for formulation. Experience at the Demo-Plant shows that the
11 formulations lacked consistency from batch to batch. Although there were no long term (greater
12 than 3 day) system upsets, adding a minute quantity of chlorine prior to the bioreactor was
13 required to disinfect potential fungal and bacterial impurities being introduced to the bioreactor
14 from the nutrient source. A soy-based glycerin source was procured and fed the bioreactor
15 starting on October 7, 2018 until shutdown. The consistent quality of the soy based nutrient
16 source improved already stable bioreactor operation, with average effluent selenium
17 concentrations below 5 parts per billion.

18 b. Expansion of the ultrafiltration system to replace the media filter: Once
19 selenium is reduced to concentrations below 5 parts per billion from drainwater through the
20 biotreatment process described above, the drainwater undergoes reverse osmosis pretreatment
21 filtration to remove particulates in the feed water. The original treatment design of the Demo-
22 Plant tested two different reverse osmosis pretreatment filtration processes – membrane
23 ultrafiltration and media filtration – to be operated and compared to determine the most
24 successful system. Based on test results, Reclamation determined that membrane ultrafiltration
25 is the best system for the conditions at the Demo-Plant. The expansion ultrafiltration process
26 equipment has been installed and became operational on October 28, 2018. Substantial
27 completion testing for the Demo-Plant was scheduled to commence immediately following final

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1 commissioning of the ultrafiltration system. However, due to plant modifications in the solids
2 handling process and limitations in pumping capacity, it was determined that substantial
3 completion testing would occur after the scheduled 2019 construction retrofits were completed
4 that addressed these issues.

5 c. Optimization of product water recovery from ultrafiltration pretreatment:

6 As identified above, ultrafiltration is a membrane process that is used to pretreat the drainwater
7 prior to the reverse osmosis process through the removal of particles. The percent of input water
8 recovered from the ultrafiltration pretreatment increased from 89% to 97%, and stably operated
9 at 97% recovery. Additional testing for ultrafiltration recovery up to 98% was performed but
10 operation was deemed unsustainable at this recovery, therefore 97% recovery was deemed the
11 maximum possible recovery for the unit.

12 d. Optimization of product water recovery from the reverse osmosis systems:

13 There were three reverse osmosis units at the Demo-Plant (a sea water reverse osmosis unit, a
14 brackish water reverse osmosis unit, and a pilot reverse osmosis unit; note that the pilot unit has
15 been decommissioned) operating in parallel being fed by the ultrafiltration effluent that is the
16 result of pretreatment described in subparagraph (b) and (c) above. The pilot reverse osmosis
17 unit was operated at up to 75% recovery of influent water, slightly below the maximum input
18 water recovery of 78% as predicted by water quality computer modeling. When operating at
19 75% recovery, 75% of the influent water is processed into clean product water, in which greater
20 than 98% of the salt is removed (rejected) and concentrated into the 25% concentrate stream that
21 does not pass through the membrane. The two demonstration-scale reverse osmosis processes at
22 the Demo-Plant were tested up to 70% recovery of input water without scale formation, where
23 greater recoveries were not possible due to the process equipment limitations (*e.g.*, high pressure
24 pumping capacity and reverse osmosis design). The Demo-Plant was designed with reverse
25 osmosis recovery of influent water to be 50%, and additional recovery of water (*i.e.*, 70% or
26 greater) was not anticipated in the original design and will necessitate retrofits to the plant to
27 handle additional pumping and flow capacity through the process. With regard to the removal of

1 selenium, selenium does not pass into the clean product water stream using the reverse osmosis
2 process, instead concentrating in the concentrate water stream that remains after reverse osmosis
3 treatment. This concentrate water stream was intended to be sent to evaporation ponds.
4 Reclamation intended to test nanofiltration membranes at the pilot scale, but due to supply
5 issues, only bench scale testing was conducted. Nanofiltration is a looser membrane as
6 compared to a reverse osmosis membrane and allows for selective passage of salts. Greater than
7 96% of the selenium was removed by the nanofiltration membrane at the bench scale tests and up
8 to 93% of input water was recovered as predicted by water quality modeling. Additional
9 nanofiltration testing is expected once the Demo-Plant undergoes construction retrofits.

10 e. Waste handling of selenium and non-selenium containing solids: The
11 processes identified in subparagraphs (b) to (d) above not only result in the recovery of product
12 water but also the production of waste streams. Some of these waste streams contain selenium
13 and are segregated from waste streams that do not. Process piping to segregate waste streams
14 containing selenium and those that do not contain selenium has been identified and temporarily
15 routed to locations most suited to receive each waste stream. Mass balance calculations have
16 verified accumulation of selenium on the bioreactor media where concentrations increase
17 sufficiently to render the bioreactor media a hazardous waste. Bioreactor operation would require
18 an economic evaluation to determine optimal operational time required for media replacement
19 frequency and associated disposal costs.

20 f. Waste handling process: A retrofit of the waste handling process has been
21 proposed due to solids accumulation in several waste handling tanks. This retrofit has been
22 designed and a solicitation for proposals is expected to be posted by summer 2019.

23 g. Path forward for the Demo-Plant: To make the waste handling process
24 improvements along with other process and structural improvements at the Demo-Plant,
25 Reclamation shut down the plant on January 1, 2019. Reclamation determined that it is more
26 cost-effective and efficient to make these improvements concurrently while the plant is offline.
27 The Demo-Plant will be offline for up to a year while these improvements are completed.

1 **II. SUPPORT FOR ADDITIONAL DRAINAGE PROJECTS**

2 10. In addition to reinitiating work under the 2018 Revised Control Schedule,
3 Reclamation has taken a series of drainage-related actions in continued support of the following
4 projects:

5 a. Grassland Bypass Project: Reclamation and the San Luis & Delta-
6 Mendota Water Authority ("Authority") continue to implement the 2009 Agreement for the
7 Continued Use of the San Luis Drain ("Third Use Agreement") that allows the Authority to
8 operate the Grassland Bypass Project ("GBP") through December 31, 2019. The GBP is further
9 regulated under Waste Discharge Requirements ("WDR") issued by the California Regional
10 Water Quality Control Board. The primary goal of the GBP is to protect the Grasslands
11 wetlands water supply channels from contamination from agricultural drainwater and storm
12 runoff originating in the Grasslands Drainage Area. Reclamation continues to conduct the GBP
13 environmental monitoring program to measure selenium and salts in the San Luis Drain, Mud
14 Slough (north), Salt Slough, and the lower San Joaquin River to confirm that monthly load
15 values specified in the Third Use Agreement and WDR continue to be met. The Third Use
16 Agreement is set to expire on December 31, 2019 at which time agricultural drainage and storm
17 water will no longer be permitted to discharge into the San Luis Drain. The Grasslands Area
18 Farmers are finalizing a project description and CEQA document for a proposed Forth Use
19 Agreement to convey storm water in the San Luis Drain, which will require Reclamation's
20 review and approval, including environmental and cultural resources compliance.

21 b. Continued Implementation of Activities Identified in the Westside
22 Regional Drainage Plan: The following activities have been implemented in support of the
23 Westside Regional Drainage Plan:

24 i. Panoche DD continues to implement activities associated with the
25 Westside Regional Drainage Plan, notably the re-use of agricultural drainwater from the
26 Grasslands Drainage Area to irrigate salt-tolerant crops such as pistachios and salt tolerant forage
27 grasses in the San Joaquin River Improvement Project ("SJRIIP"). In Water Year 2018, Panoche

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1 DD estimates 30,319 acre-feet of drainage water was used to irrigate salt tolerant crops in the
2 SJRIP. This water displaced 3,596 pounds of selenium and 202,427 tons of salt from Mud
3 Slough and the San Joaquin River.

4 ii. I previously reported on the consequences of a 2017 report by the
5 California State Controller, titled "Panoche Water District, Review Report, Administrative and
6 Internal Accounting Controls, March 1, 2013, through February 28, 2015," and on Reclamation's
7 suspension of grant agreements with Panoche DD for the SJRIP. ECF 1034-1 ¶ 10(b)(ii). The
8 suspension remains in effect pending conclusion of an investigation by the Interior Inspector
9 General. The suspension may affect further development and expansion of the SJRIP
10 infrastructure, but has not affected current operations of the SJRIP as Reclamation's grant
11 agreements do not fund operations of the SJRIP.

12 iii. In an effort to restore funding for the further development and
13 expansion of the SJRIP infrastructure, Reclamation is conferring with representatives of the
14 Grasslands Drainage Area entities regarding options for the future management of drainage
15 service for the Northerly Area Districts. It is Reclamation's understanding that entities in the
16 Grasslands Drainage Area are working to form a new Joint Powers Authority under the
17 California Government Code that would be representative of all or a substantial portion of the
18 drainage entities in the Grasslands Drainage Area. This new Joint Powers Authority would
19 oversee current and future drainage activities in the area, including at the SJRIP. Once formed,
20 the Joint Powers Authority would need to apply for a financial assistance agreement for funding
21 from Reclamation for current and future drainage construction actions. Reclamation remains
22 optimistic that such an authority will be created and the authority will apply for funding such that
23 Reclamation can restart its funding of drainage construction activities in the Grasslands Drainage
24 Area, including at the SJRIP.

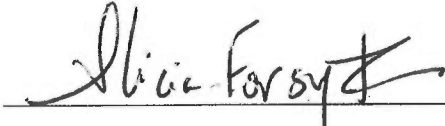
25 iv. In July 2018, the Office of the Inspector General completed its
26 audit of Reclamation's Cooperative Agreement with Panoche DD for the operations of the
27 Demo-Plant. The audit report identified \$20,777 in unsupported costs and \$193,814 in

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1 unallowable costs, for a total of \$213,891 in questioned costs. Reclamation has been working
2 with the Office of the Inspector General and Panoche DD to resolve the audit findings and
3 expects to resolve these audit findings no later than September 2019.

4 I declare under penalty of perjury that the foregoing is true and correct.

5 Signed this 29th day of March 2019, in Placer County, California.

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8 Alicia Forsythe
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